

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 08-0439

JULIE CHRISKE,
Appellant,

v.

STATE OF MONTANA ex rel Department
of Corrections and Institutions,
Appellee.

* * * * *

APPELLANT'S REPLY BRIEF

* * * * *

On appeal from the Fifth Judicial District Court
Jefferson County

* * * * *

Appearances:

John C. Doubek
Doubek & Pyfer LLP
307 North Jackson
P.O. Box 236
Helena, MT 59624

Curt Drake
Drake Law Firm, PC
P.O. Box 1181
Helena, MT 59624

Attorney for Plaintiff/Appellant

Attorney for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
APPELLANT’S REPLY BRIEF	1
CERTIFICATE OF SERVICE	5
CERTIFICATE OF COMPLIANCE	6

TABLE OF AUTHORITIES

Montana Cases

Kaeding v. W.R. Grace and Co.

1998 MT 160, 961 P2d 1256 2, 4

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 08-0439

JULIE CHRISKE,
Appellant,

v.

**STATE OF MONTANA ex rel Department
of Corrections and Institutions,**
Appellee.

* * * * *
APPELLANT'S REPLY BRIEF
* * * * *

Appellant respectfully submits this her reply brief. The issues have been well briefed. There are but a few comments Appellant feels obliged to make in response to the Appellee's Brief.

First, Appellee spends an inordinate amount of its time discussing the medical history of Appellant, citing her records that she was told to stop smoking, had some wheezing, had some pneumonia, some coughing, and a dry cough. None of that can be equated to having Chronic Obstructive Pulmonary Disease ("COPD"). None of that can be equated to having a lung disease process. No doctor told Appellant prior to board certified internist, Dr. Jeannie Brandt, M.D., on August 2, 2001 that any of Appellant's earlier symptoms, whatever they might have been, were in any way related to COPD or any other

lung disease process. Indeed, Dr. Brandt in her office record (Exhibit 2 to Appellant's Initial Brief) noted that the COPD was of "probable recent onset". She noted that the COPD was suspected as the underlying cause for fatigue and low blood oxygenation. Never before had any doctor so advised Appellant.

At page 35 of its brief, Appellee states that the Appellant's actual knowledge is not determinative in latent disease cases, but then states that in such cases "the proper inquiry is when the claimant discovered, or in the exercise of due diligence, should have discovered the elements of the claim or cause of action." Citing the *Kaeding* case, at ¶ 26. This is precisely the situation we have here. Certainly Appellant had a history of colds, some coughs, some pneumonia, but never, never did she equate the same with a chronic lung disease process. Further, she was never so advised by any physician that the same was related to a chronic lung disease process or any lung disease process other than a transient cold, cough or pneumonia. (There are several references at pages 36-37 of Appellee's brief to a Dr. "Bender". We presume that is simply a typographical error as the internist that made the COPD diagnosis was Dr. Jeannie Brandt, M.D. We're not aware of any Dr. Bender.)

Next, Appellant argues that it is incumbent upon Appellant to show that there is a genuine issue of material fact that she did not, for example, appreciate that she had some lung disease process going on before August 2, 2001. Actually, one of the pages attached to the appendix submitted by Appellee does show precisely that Appellant did not have any appreciation that she was suffering from some lung disease before the diagnosis by Dr. Brandt. Specifically, Appellee has attached page 107 of the deposition of Julie Chriske which in pertinent part reads as follows:

Q. The COPD diagnosis came, but you had had some indications in your chest before the diagnosis came, we talked about that; right?

A. Well, yeah, I had colds. I had colds and coughs and I didn't attribute it to anything that serious.

Q. Did you think it was normal?

A. Yes, actually, I did.

Q. So the COPD diagnosis came to you without you thinking you had any prior chest problems?

A. Yes. I mean, I thought I had some, you know, I thought I got colds and it just makes sense on a real core level that if you have hot smoke you're putting into your lungs, you're going to get a little more coughing more often. They just refer to it as "smoker's cough," it wasn't a big deal.

Thus the evidence shows that Appellant did not know and did not discover that she had a lung disease process going on until she was so advised by her internist, Dr. Brandt, on August 2, 2001.

Further, the medical evidence shows that Appellant routinely went to physicians for medical problems and was never so advised of the lung disease process and did not therefore reasonably conclude that she had a lung disease process until August 2, 2001.

Finally, while we understand that the Court in the *Kaeding* case decided against the Plaintiff (Appellant) ultimately, nevertheless the reason why the Montana Court held against *Kaeding* and upheld a statute of limitations argument against him was because there was a September 1, 1992 letter from a physician to Mr. Kaeding's attorney which advised that Mr. Kaeding was suffering from a condition referred to as advanced asbestosis. Mr. Kaeding, however, did not file his lawsuit until June 12, 1996 which was clearly past the statute of limitations. The only difference between the *Kaeding* case and this case is that Appellant in this case did in fact file her complaint within the 3 year statute of limitations, being advised by her physician that she had a lung disease process and not thereafter. Accordingly, Appellant urges that the lower court's summary judgment ruling be

reversed and this case be remanded for trial on the issues of when the Appellant learned of her serious lung condition (COPD), the liability of the State for causing her nicotine addiction and thus her COPD and the damages which Appellant has suffered.

DATED this 17th day of May, 2010.

DOUBEK & PYFER, LLP

By


John C. Doubek

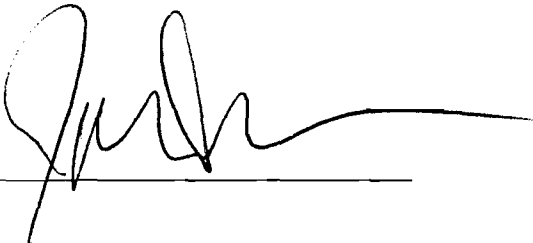
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of May, 2010, I served a true and correct copy of the foregoing upon by inserting a copy of the same in a stamped envelope and depositing it in the United States Post Office at Helena, Montana, upon:

Curt Drake
Drake Law Firm, PC
P.O. Box 1181
Helena, MT 59624-1181

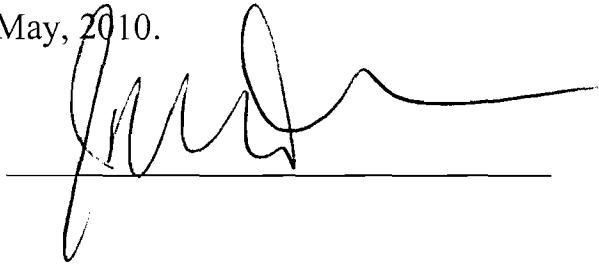
Ross Richardson
Bankruptcy Trustee
P.O. Box 399
Butte, MT 59701



CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Initial Brief complies with MONT. R. APP. P. 27 in that it is double spaced with side margins of 1.5 inches and top and bottom margins of 1 inch; that the document is proportionately spaced, of Times New Romans typeface 14, and contains 1,039 words, exclusive of tables and appendix.

DATED this 17th day of May, 2010.

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and cursive, with a long horizontal stroke extending to the right.